No. 91-1069

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

J. G. BOSWELL COMPANY,
Petitioner,
vs.
KEN WEGIS, JACK THOMSON, and
JEFF THOMSON,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
FIFTH APPELLATE DISTRICT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RALPH B. WEGIS
Counsel of Record

KLEIN, WEGIS, DeNATALE,
HALL, GOLDNER & MUIR

4550 California Avenue
Arco Tower, Second Floor
Bakersfield, California 93309
(805) 395-1000

Attorneys for Respondents

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QUESTIONS PRESENTED

1. WHETHER THE CALIFORNIA SYSTEM OF AWARDING PUNITIVE DAMAGES COMPLIES WITH FEDERAL DUE PROCESS STANDARDS.

2. WHETHER, ASSUMING THE CALIFORNIA SYSTEM ITSELF COMPLIES WITH FEDERAL DUE PROCESS STANDARDS, THE AWARD IN THIS CASE IS SO EXCESSIVE AS TO DENY DUE PROCESS OF LAW.

PARTIES TO THE PROCEEDING

The parties to the proceedings below were the petitioner, J.G. Boswell Company, a corporation ("Boswell" or "Petitioner"), and the respondents, Ken Wegis, Jack Thomson, and Jeff Thomson ("Respondents").

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Page

Page

Page

State and Federal Rules

Page

Statutes

Texts

Page

Instructions

Miscellaneous

STATEMENT OF THE CASE

Respondents incorporate by reference the comprehensive and balanced statement of facts found in the unpublished opinion of the California Court of Appeal, Fifth Appellate District, reprinted in Appendix A to Boswell's Petition for A Writ of Certiorari (the "Petition"), at 1a.[1] Additionally, because of the recurring inaccuracies and mischaracterizations of the lower court proceedings found in the Statement in Boswell's Petition (Pet. 2-6), the respondents supplement the court of appeal's opinion with the discussion below.

Boswell's appeal is from a judgment entered against it in favor of respondents on their cross-complaint for malicious prosecution, abuse of process, and intentional interference with a constitutional right.[2] The litigation was initiated by

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[1] In addition to the obvious misspellings and typographical errors in Boswell's version of the California Court of Appeal's opinion, reprinted in the Appendix to the Petition, Respondents note the following less obvious discrepancies between Boswell's reprinted version and the actual Slip Opinion: Page 13a, line 1: after "was" insert "**based entirely upon the advertisement taken out by . . .**"; Page 17a, lines 19-20: after the word "present" and before the word "advertisement" insert, "**conspiracy. Taken in the context not only of the entire . . .**"; Page 23a, line 36: the page citation to *Kruse v. Bank of America* is "**51-52**"; Page 24a, line 11: the citation to *Meyer v. Byron Jackson, Inc.* should be to "**Cal.App.3d**"; Pages 24a-25a: Respondent Jeff Thomson's name has been repeatedly misspelled as Thompson; Page 32a, line 1: after "speech," insert "**but**"; Pages 33a, line 3 and 36a, line 23: the citation should be to "***Laguna Publishing***"; Page 34a, line 6: after "to" insert "**the**"; Page 39a, line 19: change "the" to "**that**"; Page 40a, line 5: the correct case name is "***Barquis v. Merchants Collection Assn.***"; Page 40a, line 35: change "that" to "**the**"; Page 43a, line 15: delete the word "faith"; Page 54a, line 14: after "equity" insert "**value of its shares of stock. At shareholder's equity . . .**"; Page 59a, line 2: after "staying" insert "**at**"; Page 60a, line 10: the citation to *Mosesian v. Pennwalt Corp.* should be to "**Cal.App.3d**"; Page 64a, line 2: the page citation should read "739-740"; Page 64a, line 35: before "million" insert "**$1**."

[2] The court of appeal's unpublished opinion affirmed Boswell's liability on the malicious prosecution and abuse of process causes of action. (Pet. App. 20a, 43a.) The court reversed the finding for respondents on the

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Boswell itself when it filed a libel suit on May 14, 1982 against Family Farmers for Proposition 9 ("Family Farmers"),[3] Ken Wegis, and "1,000 Does,"[4] seeking $1 million in compensatory damages and $1.5 million in punitive damages against each defendant. Family Farmers, a pro-Proposition 9 committee composed primarily of owners of small farms, placed an advertisement in two San Joaquin Valley newspapers, the *Bakersfield Californian* and the *Hanford Sentinel*, which called into question Boswell's motives in opposing Proposition 9. Boswell's libel suit claimed that the advertisement was libelous per se because it accused Boswell of engaging in criminal conduct.

Immediately after filing the libel suit, Boswell sent a copy of the face-sheet of a complaint naming 1,000 Doe defendants and seeking millions of dollars in compensatory and punitive damages along with a threatening letter to the two newspapers which had published the original advertisement as well as to numerous other newspapers in the region. (RT 1075-1083; 2516-2518; RA 70-165.)[5] Boswell's assertion that it sent those letters in order to comply with the California newspaper shield law (Pet. 3) is directly contradicted by

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cause of action for interference with a constitutional right, concluding that there was not sufficient state action. (Pet. App. 37a.)

[3] Proposition 9 was a 1982 initiative which, if approved by California voters, would have permitted construction of the Peripheral Canal, a part of the planned state water project, which would have brought badly-needed water to the now drought-stricken San Joaquin Valley and Southern California.

[4] California law permits a party who is ignorant of the true name of another party to plead that unknown party by a fictitious name (usually "Doe") and to amend the pleading to reflect the real name when it is discovered. Cal. Civ. Proc. Code § 474 (West 1979).

[5] References to the trial transcript will be designated by "RT" and the page number. References to the Respondents' Appendix in the California Court of Appeal will be designated by "RA" and the page number.

the express language of California Civil Code § 48a(1)[6] and by the jury's finding that such conduct, in conjunction with the filing of the sham libel suit, constituted an abuse of process. (RA 169.) In upholding the judgment against Boswell on the abuse of process claim, the court of appeal concluded that Boswell's letter was a "veiled threat" to the newspapers not to publish further Family Farmers advertisements, which was sent with the ulterior motive of defeating the fund-raising efforts of Family Farmers. (Pet. App. 43a.)

On June 3, 1984, the trial court granted the respondents' motion for summary judgment on the original libel complaint, concluding that the advertisement was constitutionally protected opinion rather than a statement of fact charging Boswell with criminal conduct, and that the ad did "no more than construct a *motive* for [Boswell's] opposition to the canal." (RA 12-18.) On June 2, 1986, in an unpublished opinion, the California Court of Appeal, Fifth Appellate District, affirmed the trial court's ruling, holding that "we cannot believe any reader would be misled into accepting defendants' clear speculation about Boswell's motivations as a factual accusation that Boswell was guilty of a criminal conspiracy." (RA 41.)[7]

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[6] California Civil Code § 48a provides in part that in a libel suit against a newspaper, or in a slander suit against a radio, the plaintiff is restricted to special damages unless, within twenty days after publication, "a correction be demanded and be not published or broadcast." Here, of course, Boswell's libel suit was not against any media defendant and the threatening letters were mailed to many newspapers who had never published the advertisement.

[7] In its Petition, Boswell erroneously asserts that the 1986 appellate court decision relied upon an analysis "rejected by this Court in *Milkovich* . . . ." (Pet. 4.) In fact the 1986 opinion foreshadowed the holding in *Milkovich v. Lorain Journal Co.*, 497 U.S. __, 111 S.Ct. 2695, 110 L.Ed.2d 1 (1989) by concluding that no reasonable person would believe that the allegedly libelous portions of the Family Farmers' advertisement were statements of fact about Boswell's involvement in a criminal conspiracy but were instead merely examples of "the free use of epithets, hyperbole, or fiery rhetoric which is characteristic of political communications within the context of a

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In June 1988, trial commenced on the respondents' cross-complaint for abuse of process, intentional interference with a constitutional right, and malicious prosecution, the latter claim having been added following the successful termination of the libel suit. Pursuant to California Civil Code § 3295(d), Boswell requested and received a bifurcated trial on the issue of punitive damages. Thus, the issues of liability and compensatory damages were tried first; the jury found Boswell liable on all counts, and awarded each respondent $1 million in compensatory damages.[8] In answer to interrogatories the jury found by clear and convincing evidence that Boswell's conduct was "malicious, oppressive or fraudulent." (RA 171-172.) In another specific finding, the jury rejected Boswell's defense that it had sought in good faith the advice of legal counsel before filing the libel suit. (RA 168.)

Boswell implies that in this first phase of trial the evidence supporting the injuries suffered by respondents was *de minimis*. (Pet. 5.) In fact, the court of appeal reviewed carefully the conflicting evidence on compensatory damages

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political battle." (Pet. App. 9a.) Six years later, in *Milkovich*, this Court reaffirmed the traditional constitutional protections for fair comment during public debate as well as the protected use of "rhetorical hyperbole." *Milkovich*, 110 L.Ed.2d at 14-16. This Court also held that to be actionable as libel "a statement on matters of public concern must be provable as false" and that the statement must " 'reasonably [be] interpreted as stating actual facts' about an individual." *Id.* at 18, 19. However, even if, arguendo, the 1986 opinion utilized an improper standard, the issue was revisited by the California Court of Appeal in its 1991 decision in this case, when the appellate court fully reviewed in light of *Milkovich* the question of Boswell's lack of probable cause to file the original libel suit. (Pet. App. 17a-20a.) Not surprisingly, the court reached a conclusion consistent with the one it had reached in 1986.

[8] Boswell's Statement (Pet. 5) erroneously suggests that the jury's verdicts on compensatory and punitive damages were rendered on the same date, July 15, 1988. In fact, the compensatory damages verdict was rendered at the conclusion of the first phase of trial, while the punitive damages verdict was rendered six days later at the conclusion of the second phase of trial.

presented during the first phase by both sides and concluded as follows:

> Boswell's characterization of Family Farmers' emotional distress as amounting to a few sleepless nights is contradicted by strong evidence to the contrary presented by Family Farmers. Going through a period of shock and depression with extended sleepless periods, a period in which one fears for one's financial future and fears to continue involvement in political activities in which one had traditionally participated is not simple worry or simple anger or simple frustration. Such concern is not equivalent to just a few sleepless nights. (Pet. App. 46a.)

Boswell also intimates that respondents' counsel infected the first phase of the trial with "an atmosphere of fierce and inflammatory invective specifically calculated to prejudice the jury against Boswell." (Pet. 4.) However, Boswell's trial counsel apparently did not find those comments sufficiently offensive to make a timely objection at trial as required by California law. (Pet. App. 57a.) The appellate court also observed that Boswell had taken "most of opposing counsel's comments to the jury and closing argument out of context." (Pet. App. 55a.) The court of appeal concluded that most of the comments of respondents' counsel were "supported by the evidence set forth in the record" (Pet. App. 56a), and that the remaining comments "may be reasonably inferable and not unfair." (Pet. App. 57a.)

Six days later, at the punitive damage phase of the trial, Boswell urged that its net worth was $232 million. (RT 4632.) This figure, however, valued extensive land and water rights acquired early in this century at original cost, not market value. Respondents contended that the evidence established a fair market value of Boswell's assets in excess of $800 million. (RT 4104-4137; 4502-4524; 4631.) The jury was then again instructed on the bases on which it could

impose punitive damages, the requirement that such a finding be by clear and convincing evidence, and the factors which the jury must consider in making any punitive damages award. (RA 173.) The factors the jury was instructed to consider included the reprehensibility of the defendant's conduct, the amount of punitive damages which would have a deterrent effect on the defendant in light of its financial condition, and that punitive damages must bear a reasonable relation to the actual damages. (RA 173.) Apart from proffering a despicable conduct instruction after closing argument, Boswell made no recorded objection to any of the punitive damage instructions given by the trial court.[9] Based upon this evidence, the jury awarded each respondent $3.5 million in punitive damages. (RA 173.)

Following the trial, Boswell moved for Judgment Notwithstanding the Verdict and for a New Trial. After conducting an independent review of the damages awards as required by California Code of Civil Procedure § 657, in which the trial judge "read, considered and weighed the entire available record of the trial" (Pet. App. 68a), the judge assigned to hear the motions (a new judge, because the trial judge was ill) denied the motion for Judgment Notwithstanding the Verdict. The judge, however, conditionally granted the motion for New Trial on the "sole ground that the amount of compensatory damages awarded to each Plaintiff is excessive, the condition being the refusal of each Plaintiff to accept a reduction in the amount of compensatory damages awarded to $200,000 to each Plaintiff." (RA 60.) The trial court found that although the respondents had "suffered emotional distress over a substantial period of time due to

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[9] The jury was not instructed in either phase of trial on the definition of "despicable conduct." While the jury was deliberating, Boswell tardily tendered such an instruction, which the trial court refused to give. The court of appeal affirmed that ruling, holding that "Boswell waived this issue at trial when it failed to submit [the proposed instruction] to the trial court in a timely manner pursuant to section 607a of the Code of Civil Procedure." (Pet. App. 52a.)

the acts of [Boswell]," the injuries were not disabling or permanent. (Pet. App. 68a.) The court therefore found that "$200,000 is at the top of the range of fair and reasonable compensatory damages which could be awarded in this case as to each [respondent]." (Pet. App. 68a.) As part of its order, the trial court specifically found that "the punitive damages awarded by the jury as to each Plaintiff bear a reasonable relationship to the compensatory damages awarded as reduced by the Court, and that said punitive damages awards are neither excessive nor the product of passion or prejudice." (RA 60.) Boswell never requested that the trial court make more specific findings regarding its ruling.

The respondents subsequently consented to a modification of the judgment involving the remission of the sum of $800,000 each in compensatory damages. (RA 61-63.) Boswell appealed the judgment and the trial court's denial of its Motion for Judgment Notwithstanding the Verdict. Respondents cross-appealed from the trial court's conditional granting of Boswell's Motion for New Trial. The judgments of the Kern County Superior Court as to Boswell's appeal and respondents' cross-appeal were affirmed by the California Court of Appeal, Fifth Appellate District, Case No. F011230, in an unpublished opinion on June 14, 1991.

In an egregious mischaracterization, Boswell asserts that the court of appeal's 1991 decision "summarily rejected Boswell's due process challenges." (Pet. 6.) In fact, the court of appeal engaged in a thoughtful and reasoned analysis of this Court's decision in *Pacific Mutual Life Insurance Company v. Haslip*, __ U.S.__, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991), before concluding that neither the California system of awarding punitive damages nor the specific award in this case violated federal due process. (Pet. App. 47a-55a.)

Boswell has presented a misleadingly abridged summary of the holding of the court of appeal as to punitive damages and its reasons for that holding. (Pet. 6.) While the court of

appeal did refer to Boswell's net worth in reviewing the punitive damage award, the court clearly considered not only the net worth of petitioner, but also the reduced compensatory damage award, the bifurcated nature of the punitive damage phase of the trial, and the trial court's instructions to the jury. (Pet. App. 55a.)

Following the adverse decision in the unpublished court of appeal opinion, Boswell filed a Petition for Rehearing in the California Court of Appeal, which was denied on July 11, 1991. Boswell's Petition for Review was denied by the California Supreme Court in an unpublished order on October 3, 1991. (Pet. App. 66a.)

REASONS THE PETITION SHOULD BE DENIED

I. THE CALIFORNIA SYSTEM OF AWARDING PUNITIVE DAMAGES COMPLIES WITH FEDERAL DUE PROCESS STANDARDS.

A. Introduction.

Petitioner seeks to entice this Court to grant certiorari by suggesting that *Haslip* requires the presence of certain precise and fixed procedures within a state's punitive damage award scheme and that California's system is constitutionally suspect because it does not contain each and every one of those procedures. The fallacies in Boswell's logic are twofold. First, as this Court is well aware, *Haslip* eschewed any "bright line" formulation and instead articulated a set of broad due process considerations which were found to have been met by the Alabama system when considered as a whole.

Second, Boswell's description of the California system for awarding punitive damages is both inaccurate and incomplete. The California system has augmented the traditional common law system approved in *Haslip*, 113 L.Ed.2d at 19,

with significant additional statutory safeguards. *E.g.*, Cal. Civ. Proc. Code §§ 625 and 657 (West 1991 supp.); Cal. Civ. Code §§ 3294 and 3295 (West 1991 supp.). As a result, California requires comprehensive jury instructions which are far more thorough than those approved in *Haslip* and which clearly impose meaningful limits upon the jury's discretion. The California system of post-trial review, far from being "deferential" and "toothless," provides for a two-step review process. First, the trial judge conducts an independent review of all of the facts and evidence supporting the award and is required to order a new trial if he determines that the damages awarded are clearly excessive. If the trial court upholds the jury's verdict as to damages, the appellate court again reviews the entire record to determine whether there is substantial evidence to support the award. Thus, both the trial and appellate courts consider the particular nature of the defendant's actions in light of the entire record, the degree of reprehensibility of the defendant's conduct, the relationship of compensatory to punitive damages, and the financial condition of the defendant — factors substantially similar to those required by Alabama and cited with approval in *Haslip*.

B. The Haslip Decision.

In *Haslip* this Court once again acknowledged that the common-law method for assessing punitive damages is not "so inherently unfair as to deny due process and be per se unconstitutional." *Haslip*, 113 L.Ed.2d at 19. This Court underscored that it could not "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit in every case," and that it could only say that "general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus." *Id.* at 20. In upholding the award, the Court discussed with

approval the specific procedures used in the Alabama scheme at issue, i.e., (1) jury instructions which imposed "reasonable constraints" upon the jury's discretion; (2) post-trial scrutiny of the award by the trial court wherein the court reflects in the record its reasons for interfering with the jury's verdict, or for refusing to do so, after considering a number of factors; and (3) review by the Alabama Supreme Court which provides a further check on the jury's decision to insure that the punitive damages are "reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition." *Id.* at 21-22.

Boswell has disingenuously sought to transform the procedural safeguards in the Alabama system which this Court found sufficient to satisfy due process into what is "indispensable" as a constitutional requirement in all states, including California. (Pet. 7.) This Court stressed in *Haslip* that due process did not mandate any specific set of requirements but required that the discretion permitted by the state be "exercised within reasonable constraints." *Id.* at 21. This view was consistent with that previously expressed by this court. *Ownbey v. Morgan*, 256 U.S. 94, 110-112 (1921) ["{The Fourteenth Amendment's} function is negative, not affirmative, and it carries no mandate for particular measures of reform."]. The South Carolina Supreme Court echoed a similar view when it observed that this Court "did not hold that each and every procedural protection furnished to Alabama defendants need be afforded to all defendants in all cases throughout the land . . . [I]t is sufficient that the protections meet 'general concerns of reasonableness' and are followed by 'adequate guidance' from the trial court." *Gamble v. Stevenson*, 406 S.E.2d 350, 354 (S.C. 1991).

C. California's System For Awarding Punitive Damages Satisfies Due Process.

1. California's Additional Statutory Safeguards On An Award of Punitive Damages.

Boswell's portrayal of the California system of awarding punitive damages conveniently ignores or misstates many of the distinguishing and prominent safeguards of that system which, taken as a whole, unquestionably meet the standards articulated by *Haslip*. These safeguards begin well before trial. California Civil Code § 3295 protects punitive damage defendants such as Boswell by prohibiting pre-trial discovery of often sensitive financial information unless the plaintiff, upon motion, is able to satisfy the court that a "substantial probability" exists that plaintiff will prevail on the punitive damage issue at trial. Cal. Civ. Code § 3295(c). Additionally, the trial court must, on application of a defendant, bifurcate the trial to preclude evidence of the defendant's profits or financial condition until after a trier of fact returns a verdict for plaintiff awarding actual damages and also finds that the defendant is guilty of fraud, oppression, or malice, the statutory pre-requisites to an award of punitive damage. Cal. Civ. Code § 3295(d). Additionally, in personal injury or wrongful death cases, California prohibits the plaintiff from pleading a specific amount of punitive damages. Cal. Civ. Proc. Code § 425.10(b).[10] These protections are in addition

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[10] Interestingly, in the report of the President's Council on Competitiveness, upon which petitioner relies (Pet. 11), the authors make five recommendations regarding reform in punitive damages: (1) eliminating dollar amounts from pleadings; (2) splitting trials into two phases; (3) requiring proof by clear and convincing evidence; (4) judicial determination of the amount of punitive damages; and (5) a cap on punitive damages awards. Report of the President's Council on Competitiveness, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA 12 (Aug. 1991). In California, the first three recommendations have already been codified by statute. *See*

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to the comprehensive jury instructions and the meaningful review process undertaken by the trial and appellate courts.

2. California's Jury Instructions on Punitive Damages.

When, as in this case, the defendant requests a bifurcated trial, the jury is instructed in the first phase concerning the statutory requirements for an award of punitive damages. California Book of Approved Jury Instructions (BAJI), (7th Ed. 1986) (1991 Supp.), 14.72.1.[11] That instruction informs the jury that if it finds that actual injury, harm or damage was legally caused by the defendant, and if it also finds by clear and convincing evidence that the defendant acted with oppression, malice, or fraud, then the jury may award punitive damages. Cal. Civ. Code § 3294; *Neal v. Farmer's Insurance Exchange*, 21 Cal.3d 910, 922, 148 Cal.Rptr. 389 (1978). The instruction defines the terms "oppression," "fraud," "malice," and "despicable conduct."[12]

(fn. continued)
Cal. Civ. Code § 3295; Cal. Civ. Proc. Code § 425.10(b). As will be discussed *infra*, in ruling on a motion for a new trial, the court independently reviews an award of punitive damages and can insert its own judgment for that of the jury. Thus, California has already adopted four of the five recommendations of the President's Council. Due process does not require that the fifth recommendation, a cap on punitive damages, be imposed on states.

[11] BAJI is a set of California jury instructions which have been approved by the California Judicial Council for use in civil trials. The instructions are mandatory in Los Angeles County Superior Court and are approved and recommended, but not mandatory, in all other jurisdictions in California. In the great majority of cases BAJI has been upheld and praised for its accuracy, fairness, and completeness, *e.g.*, *Temple v. DeMirjian*, 51 Cal.App. 559, 566, 125 P.2d 544 (1942), and may be regarded as almost the equivalent of official forms. 7 Witkin, *California Procedure* (3d Ed. 1985), §§ 251, 253.

[12] In describing the California system of instructing juries on punitive damages, Boswell refers to BAJI Instruction 14.71 without a page or year reference. (Pet. 15.) California Civil Code § 3294 became effective January

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If, in the first phase of trial, a jury finds affirmatively on the issues set forth in BAJI 14.72.1 (1989 Re-Revision) (1991 Supp.), a second phase of trial will be held during which evidence of defendant's financial worth will be presented. At the conclusion of that phase, the jury is instructed that if it determines that punitive damages should be assessed, the jury "must consider" the reprehensibility of the

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(fn. continued)
1, 1988 and the jury in this case was instructed according to the provisions of § 3294(a) without objection from Boswell. As will be discussed, *infra*, Boswell received a more favorable instruction during the second phase of trial than it was entitled to by California law.

Boswell's reference to BAJI 14.71 is misleading for several reasons. First, Boswell cites the instruction in support of its constitutional challenge to California's *present* system of awarding punitive damages. However, BAJI 14.71 was revised extensively in 1989 in response to amendments to California Civil Code § 3294 and *Gagnon v. Continental Casualty Co.*, 211 Cal.App.3d 1598, 1605, 260 Cal.Rptr. 305, 309 (1989), (1) to reflect a change in the burden of proof from a preponderance of the evidence to clear and convincing evidence; (2) to require, upon defendant's request, that the jury be instructed it must consider that the punitive damages bear a reasonable relation to the injury, harm, or damage actually suffered by plaintiff, in addition to the reprehensibility of defendant's conduct and the amount of punitive damages necessary to have a deterrent effect on defendant; (3) to add the definition for "despicable conduct;" and (4) to allow for bifurcation of the trial. BAJI 14.71 (1989 Revision)(1991 Supp.). Second, Boswell's Petition creates the impression that the old version of BAJI 14.71, which contains the preponderance of the evidence standard, was the instruction given at trial. However, since Boswell requested a bifurcated hearing, separate punitive damages instructions were given in each phase of the trial which were derived from portions of the old BAJI 14.71, but which included the addition of the clear and convincing burden of proof standard both as to liability for punitive damages and for assessing the amount of punitive damages. (RA 173, 180.) Both sides tendered punitive damage instructions; Boswell, which had retained a separate counsel just to review jury instructions, submitted to the court an article critical of the BAJI instructions. As a result, changes were made at the request of the defendant, and at the end, no objections were made by either side as to the instructions in their final form. (RT 3601-3605.) Any discussion by Boswell of the present status of California's system of awarding punitive damages in a bifurcated proceeding should focus upon BAJI 14.72.1 (1989 Re-Revision) and 14.72.2 (1989 Re-Revision)(1991 Supp.), which accurately reflect present California law.

defendant's conduct, the amount of punitive damages which would have a deterrent effect on the defendant in light of defendant's financial condition, and that punitive damages must bear a reasonable relation to the "injury, harm, or damage actually suffered by the plaintiff." *Gagnon v. Continental Casualty Co.*, 211 Cal.App.3d 1598, 1603, 260 Cal.Rptr. 305 (1989); BAJI 1472.2 (1989 Re-Revision) (1991 Supp.).

A comparison of the California instructions with the Alabama instruction scrutinized by this Court in *Haslip* demonstrates that, far from permitting "unfettered jury discretion" (Pet. 14), the California instructions together provide far greater protection than did the Alabama instruction approved in *Haslip*. *Haslip*, 113 L.Ed.2d at 12 n. 1; 20-21.[13] Contrary to Boswell's assertion (Pet. 14), the California instruction does not provide that the jury "may" consider certain objective factors. Rather, the instructions clearly mandate jury consideration of the degree of reprehensibility, deterrence in light of defendant's financial worth, and relation to the harm, injury or damage actually suffered. *Gagnon*, 311 Cal.App.3d at 1603; BAJI 1472.2 (1989 Re-Revision) (1991 Supp.). Moreover, the California instructions require a higher burden of proof, i.e., clear and convincing evidence, than the "reasonably satisfied from the

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[13] Additionally, unlike Alabama, which permits a corporation to be held liable for punitive damages for fraud by one of its employees acting in the scope of his employment, *Haslip*, 113 L.Ed.2d at 17, California requires a much more difficult showing that "an officer, director, or managing agent of the corporation" (1) had advance knowledge of the unfitness of the employee and employed him with conscious disregard of the rights or safety of others; (2) authorized or ratified the wrongful conduct; or (3) was personally guilty of oppression, fraud, or malice. Cal. Civ. Code § 3294(b). By providing this added safeguard, California law prevents a corporation from being held liable for punitive damages for the misconduct of a mere employee, thereby insuring that "plaintiffs will not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket." *Haslip*, 113 L.Ed.2d at 22. Of course, in this case, the misconduct for which Boswell was held liable was devised and carried out at the highest levels of the corporation.

evidence" standard employed in Alabama. Cal. Civ. Code § 3294. Indeed, this court expressly stated that due process did not require a standard higher than preponderance of the evidence where, as in Alabama, the lesser standard was "buttressed . . . by the procedural and substantive protections" discussed in *Haslip*. *Haslip*, 113 L.Ed.2d at 23 n. 11.

Boswell's rejoinder is that the three criteria set forth in the California instructions either fail to give the factfinder sufficient guidance or actually mislead the factfinder. (Pet. 15-16.)[14] Relying upon *Giaccio v. Pennsylvania*, 382 U.S. 399, 404 (1966), Boswell suggests that "reprehensibility" is too vague to provide "practical guidance" to the jury. (Pet. 15.) However, a similar "void for vagueness" argument, also based on *Giaccio*, was rejected by this Court in *Haslip*. *Haslip*, 113 L.Ed.2d at 23 n. 12.

California's requirement that, in awarding punitive damages, a jury must consider the defendant's financial condition is designed to serve the societal interests of deterrence and punishment. *Adams v. Murakami*, 54 Cal.3d 105, 110, 284 Cal.Rptr. 318, 813 P.2d 1348 (1991). The California Supreme Court has emphasized that "the purpose of punitive damages is not served by financially destroying a defendant," *id.* at 114, and that the principle of relating punitive damages to the ability to pay is an ancient one, dating to the Magna Carta. *Id.* at 115. Thus, the requirement

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[14] Interestingly, Boswell has misstated all three factors which the jury must consider. The first factor is "reprehensibility of the *conduct* of the defendant," not mere "reprehensibility." (Pet. 15.) The second factor is not "the wealth of the defendant," (Pet. 15), but rather that the jury should consider "*the amount of punitive damages which will have a deterrent effect on the defendant* in light of defendant's financial condition." Finally, the 1989 revisions of the instructions changed the third factor from a consideration that the punitive damage award must bear a reasonable relation "to the compensatory award," (Pet. 16), to a consideration that "the punitive damages must bear a reasonable relation *to the injury, harm, or damage actually suffered by the plaintiff*." BAJI 14.72.2 (1989 Re-Revision) (1991 Supp.).

of proof of defendant's net worth, far from prejudicing the defendant, actually protects him because, "[a]bsent such evidence, a reviewing court cannot make an informed decision whether the amount of punitive damages is excessive as a matter of law." *Id.* at 118.

Boswell offers no explanation of why a consideration of the defendant's financial condition "only adds to the arbitrary and irrational nature of punitive damages awards." (Pet. 15.) Although the various states may differ on this public policy — Alabama itself excludes from the jury evidence of a defendant's wealth — nevertheless considerations of federalism teach that the development of specific criteria and procedures for awarding punitive damages are better left to the individual states so long as such criteria and procedures together impose reasonable constraints on punitive damage awards.

Finally, petitioner urges that consideration of the relationship of punitive damages to the compensatory award leads to wildly disparate results and is unworkable in the absence of either some fixed ratio or at least guidelines as to what constitutes a "reasonable" ratio. (Pet. 16.) Current California law requires that the jury must consider the relation of the punitive damage award to the "injury, harm, or damage actually suffered by the plaintiff," rather than just to the "actual damages." *Gagnon*, 211 Cal.App.2d at 1603.

When the amount of punitive damages is no longer viewed in light of the compensatory damage award but is instead considered in light of the actual harm suffered by the plaintiff, the concept of a mechanical or fixed ratio becomes problematic. For example, when a plaintiff is not entitled to an award of compensatory damages, but obtains only minimal damages or equitable relief, "the ratio method becomes troublesome, if not unworkable . . . ." *Gagnon*, 211 Cal.App.3d at 1604. As one member of this Court has observed, the "case by case" existence of the jury and the generality of instructions are features of the jury system

which "discourage uniform results, but nonuniformity cannot be equated with constitutional infirmity." *Haslip*, 113 L.Ed.2d at 34 (Kennedy, J., concurring).

In accordance with this view, California has long held that there is no fixed ratio by which to determine the reasonableness of the relationship between punitive damages and the actual harm suffered. *Finney v. Lockhart*, 35 Cal.2d 161, 164, 217 P.2d 19 (1950). The calculation of punitive damages does not involve strict adherence to a rigid formula but instead involves a "fluid process of adding or subtracting depending on the nature of the acts and the effect on the parties and the worth of the defendants." *Walker v. Signal Companies, Inc.*, 84 Cal.App.3d 982, 998, 149 Cal.Rptr. 119 (1978).

In sum, California juries are now instructed that punitive damages must bear a reasonable relationship to plaintiff's injury. The Constitution should not be interpreted to require more. The common law has never required a fixed ratio — or range of ratios — between punitive and compensatory damages in all cases. No state, including Alabama, whose law was upheld in *Haslip*, imposes such a requirement. And given the factual diversity of the cases, such a requirement would lead in some cases to damages greater than those needed to serve the purposes of punishment and deterrence, while in others it would result in damages inadequate to achieve those purposes. *See Adams*, 54 Cal.3d at 110. While the California legislature may have chosen, in some limited circumstances, to quantify the computation of the amount of punitive damages,[15] this state's wisdom has generally been to vest this decision in the informed discretion of the jury and trial court.

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[15] For example, in the Unruh Civil Rights Act, Cal. Civ. Code Section 51 *et seq.* (West 1991 Supp.), a defendant found to have discriminated on the basis of sex, color, race, religion, ancestry, national origin, or physical disability is liable in any amount determined by the jury up to "three times the amount of actual damages." Cal. Civ. Code Section 52(a).

3. California's Effective Post-Trial Review Process.

Boswell next contends that in California both the trial and appellate courts "adhere . . . to an extremely deferential, essentially toothless standard of review," i.e., reversing as excessive only those judgments deemed to have resulted from passion and prejudice. (Pet. 17.) Boswell's contention is incorrect. On motion for a new trial by any party, the trial court conducts a fully independent review of the record to determine whether the award is excessive. In the event the new trial motion is denied, the appellate court, using specific criteria, again scrutinizes the award to determine whether it is supported by substantial evidence.

California law permits a party to move for a new trial on a variety of bases, including excessive damages or insufficiency of the evidence to justify the verdict. Cal. Civ. Proc. Code § 657(5),(6). This language in § 657 has long been construed in California to vest the trial court "with authority to disbelieve witnesses and reweigh the evidence." *Martinides v. Mayer*, 208 Cal.App.3d 1185, 1197, 256 Cal.Rptr. 679 (1989). *See also Neal*, 21 Cal.3d at 933 [in ruling on motion for new trial, trial court sits as an independent trier of fact, not in an appellate capacity]; *Dixon v. St. Francis Hotel Corp.*, 271 Cal.App.2d 739, 742, 77 Cal.Rptr. 201 (1969). Far from deferring to the jury's verdict, the trial court has a duty to reduce the damages award if it finds, in its independent review, that the award is excessive, and appellate decisions encourage trial courts to fulfill their responsibilities in this regard. *See, e.g., Tice v. Kaiser Co.*, 102 Cal.App.2d 44, 46, 226 P.2d 624 (1951); *Norden v. Hartman*, 111 Cal.App.2d 751, 757, 245 P.2d 3 (1952).

The trial judge's duty under California law was succinctly stated in *Lippold v. Hart*, 274 Cal.App.2d 24, 25, 78 Cal. Rptr. 833 (1969), in which the trial court's decision was reversed for failure to exercise its independent judgment:

> [B]ut a judge is not bound by a conflict in evidence when he is ruling on a motion for new trial; rather, he must reweigh the evidence, the inferences therefrom, and the credibility of witnesses in determining whether the jury 'clearly' should have reached a different verdict. [citations omitted.]

In the event the trial court agrees with a defendant that the damages awarded are excessive and orders a new trial, an appellate court will reverse the trial court only if there has been a manifest and unmistakable abuse of discretion. *Martinides*, 208 Cal.App.3d at 1187. If the new trial motion is denied, the appellate court will review the entire record to determine whether there is substantial evidence to support the judgment. An award of damages will be overturned if it is excessive as a matter of law or if, after reviewing the record in the light most favorable to the nonmoving party, it is so grossly disproportionate to the harm suffered as to raise the presumption that it resulted from passion or prejudice. *Hasson v. Ford Motor Company*, 32 Cal.3d 388, 419, 185 Cal.Rptr. 654, 650 P.2d 1171 (1982); *Neal*, 21 Cal.3d at 928.

The review required is not perfunctory; to the contrary, the reviewing court is required to consider a number of factors, including the particular nature of the defendant's conduct in light of the whole record, the degree of reprehensibility of the defendant's conduct, the amount of punitive damages awarded, and the wealth of the particular defendant. *Adams*, 54 Cal.3d at 110; *Neal*, 21 Cal.3d at 927-928. Thus, the California appellate courts, in the course of their review, consider factors substantially similar to those required by Alabama and discussed by this Court in *Haslip*. *Haslip*, 113 L.Ed.2d at 22.[16]

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[16] Although Alabama provides that the seven listed factors *could* be taken into consideration on review, *Haslip*, 113 L.Ed.2d at 22, even those courts which have literally construed *Haslip* to require consideration of the same seven factors required by Alabama have recognized that due process may be satisfied by a court's consideration of only a few of those factors. *E.g.*,

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The efficacy of California's system of reviewing damage awards is exemplified by the case at bar, where, on motion for a new trial, the trial court read the entire trial record, reweighed the evidence and then reduced the awards of compensatory damages by a total of $2.4 million. *See Gamble*, 406 S.E.2d at 354 [sustaining the punitive damage award but reducing the compensatory damage award by fifty percent indicates a "meaningful and adequate review by the trial court of the damages assessed by the jury."]. As this Court noted in *Haslip*, whatever the system employed by the state, it must "have real effect when applied by the [state courts] to jury awards." *Haslip*, 113 L.Ed.2d at 23. The careful review here by the court of appeal of the jury's awards is consistent with the California appellate review process generally. California courts frequently reduce damage awards on review. *E.g., Devlin v. Kearney Mesa AMC/Jeep/Renault, Inc.*, 155 Cal.App.3d 381, 393-396, 202 Cal.Rptr. 204 (1984) [In seven of sixteen decisions reviewed, trial or appellate court reduced either compensatory or punitive damages or both.] Having received, in the form of the remittitur, the full benefit of California's effective review system, Boswell's misstatement of the nature of that review process under § 657 and its repeated characterizations of the process as "toothless" and "deferential" are particularly odious.[17]

(fn. continued)
Eichenseer v. Reserve Life Ins. Co., 934 F.2d 1377 (5th Cir. 1991) [finding sufficient evidence in record to satisfy three of the seven *Haslip* factors and therefore affirming award]; *Johnson v. Hugo's Skateway et al.*, __F.2d__, 1991 WL 244278 n. 6 (4th Cir. 1991).

[17] Petitioner also contends that California's system of punitive damages is constitutionally defective because it fails to require the trial court to make specific findings in the record regarding its reasons for denying a motion for a new trial. (Pet. 20.) This Court has indicated that the purpose behind such a requirement would be to ensure "meaningful and adequate review by the trial court whenever a jury has fixed the punitive damages." *Haslip*, 113 L.Ed.2d at 21. California requires a new trial judge to state his reasons for granting a motion for new trial, Cal. Civ. Proc. Code § 657, a reasonable requirement which facilitates review of an appeal from the granting of the motion. Where, as in California, the jury is given clear guidance as to the

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4. Comparison of Punitive Damages Awards in California.

Boswell asserts that California's system of awarding punitive damages violates *Haslip* because California prohibits the appellate courts from considering damage awards rendered in similar cases. (Pet. 21.) Although this prohibition is a caveat frequently found in the published decisions in California, such a prohibition is often observed more in the breach. *E.g.*, *Devlin*, 155 Cal.App.3d at 393-396 [court compiled appendix collating sixteen prior appellate decisions on punitive damages in categories including compensatory damages, punitive damages, percentage ratio of punitive damages to wealth of defendant before and after the motion for new trial, the appellate court ruling, and the final relationships of punitive damages to compensatory damages and to the wealth of the defendant.] Indeed, in this case, the parties fully briefed the issue of the punitive damage award in relation to other awards (Boswell's Opening Brief, 32-33; Respondent's Brief, 33-34; Boswell's Reply Brief, 21-22) and, in its opinion, the court of appeal engaged in just such a comparison as part of its determination whether the punitive damage award in this case was disproportionate or excessive. (Pet. App. 53a.)

The problems inherent in mechanically basing an award of punitive damages upon a comparison with awards in other cases are patent. *See Bertero v. National General Corp.*, 13 Cal.3d 43, 65 n. 12, 118 Cal.Rptr. 184 (1974) ["The vast variety of and disparity between awards in other cases demonstrate that injuries can seldom be measured on the same

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factors that it must consider in assessing damages, the need for subsequent written findings is obviated when the motion is denied, because the reviewing court can review the award by applying the same factors. *See Neal*, 21 Cal.3d at 932-933. Moreover, the trial court in the instant case made specific findings. (Pet.App. 68a.) Boswell never objected at trial to the sufficiency of the trial judge's order.

scale . . . ."]; *Gagnon*, 211 Cal.App.3d at 1604 ["In the final analysis, . . . the propriety and amount of punitive damages depends entirely upon the particular facts of a case."]

Also, since unpublished appellate opinions and trial court opinions in unappealed cases are unavailable for comparison, the only cases that are readily accessible to a reviewing judge for comparison are published appellate decisions. Moreover, even those decisions which are published are often written to decide those particular cases and may omit facts which would bear on comparability with other cases.[18]

Respondents know of no quantifying calculus or mathematical formula which would permit, as Boswell suggests (Pet. 22 n. 11), a court reasonably and fairly to compare the awards in *Grimshaw v. Ford Motor Co.*, 119 Cal.App.3d 757, 174 Cal.Rptr. 348 (1981)[19] and the instant case. *Grimshaw* involved severe physical injuries from an automobile accident while this case involved severe and long-lasting emotional distress resulting from the filing of a meritless and intimidating lawsuit which threatened to take away the respondents' homes and livelihoods. The misconduct in *Grimshaw* involved Ford's reckless endangerment of thousands of Pinto owners by the production of a defective product. Boswell abused the legal process of this state by intentionally and maliciously pursuing a baseless lawsuit with the specific goal of intimidating and silencing its political opponents. Although Boswell leaps with relative ease to the conclusion that the harm in *Grimshaw* is much more

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[18] For similar reasons, California, in the review of verdicts imposing the death penalty, refuses to permit a comparison of facts in other cases with those of the case being reviewed, in light of this Court's ruling that such refusal is appropriate. *Pulley v. Harris*, 465 U.S. 37, 50-51 (1984); *People v. Allen*, 42 Cal.3d 1222, 1287-1288, 232 Cal.Rptr. 849, 729 P.2d 115 (1986).

[19] Boswell neglects to mention that the original punitive damage award fixed by the jury was $125 million. The award was reduced to $3.5 million on the motion for a new trial, another example of the efficacy of California's system of reviewing punitive damages.

egregious than that suffered in this case, in reality the two cases evade such naive and dogmatic moral quantifications. To undertake a truly fair and meaningful comparison of such cases is undoubtedly more difficult and taxing for the thoughtful and deliberate jurist than it is for an interested party such as Boswell.[20]

II. ASSUMING THE CALIFORNIA SYSTEM ITSELF COMPLIES WITH FEDERAL DUE PROCESS STANDARDS, THE AWARD IN THIS CASE IS NOT SO EXCESSIVE AS TO DENY DUE PROCESS OF LAW.

A. The Punitive Damage Award Was Not Excessive Or The Product Of Passion Or Prejudice.

Boswell contends that the jury verdict must be set aside because both the trial and appellate courts found that the jury was inflamed with passion and prejudice. (Pet. 24-25.) Such

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[20] Boswell's suggestion that the California courts are engaged in a secretive conspiracy of silence (Pet. 23 n. 12), by ruling on punitive damage awards in "unpublished" opinions, is so preposterous that it cannot be allowed to pass without comment. California Rule of Court 976 prescribes the limited circumstances under which a court of appeal's opinion may be published.

Although in theory it is possible that, as Boswell urges, a vast conspiracy exists among California's courts to ignore the issues raised in punitive damage cases by refusing to publish such decisions, a less extravagant and more reasonable explanation is that this case, and others like it dealing with punitive damage issues, simply do not meet Rule 976's criteria for publication.

Moreover, California has an established procedure whereby any person may make a request to the court of appeal for the publication of an unpublished opinion. *See* Cal. Rule of Court 978. If the court of appeal does not grant the request to publish, the request is automatically forwarded to the California Supreme Court for consideration. Cal. Rule of Court 978. Boswell never requested publication of the opinion in this case.

an argument, however, misstates the record. With respect to compensatory damages only, the trial court found that award to be excessive due to the passion and prejudice engendered by the nature of the case. (Pet. App. 68a.) In upholding the trial court's conditional order of a new trial as to compensatory damages, the court of appeal held only that the trial court's order was not the result of a "manifest or unmistakable abuse of discretion." (Pet. App. 65a.) With respect to punitive damages, the trial court found that award, in addition to bearing a reasonable relation to the compensatory award and not being excessive, was entirely free of passion and prejudice. (Pet. App. 68a.) The court of appeal, following its own analysis, similarly found that the punitive damage award was neither excessive nor disproportionate. (Pet. App. 55a.)

The same jury that might have been unduly swayed by the relative size of the parties in assessing compensatory damages in the first phase of trial (Pet. App. 64c), was, in the second phase of trial, required to consider the relative size of the parties when it was properly instructed to consider the net worth of the defendant, the reprehensibility of its conduct, and the actual harm done. Under these circumstances, the findings of the trial court and the court of appeal are neither inexplicable nor inconsistent.

Similarly, the trial judge had to consider quite different issues in reviewing for excessiveness the award of compensatory damages than in reviewing the award of punitive damages. In reviewing the compensatory award, the trial judge had to consider and apply California law regarding awards for severe emotional distress. *See, e.g., Bertero*, 13 Cal.3d at 64-65. By contrast, in reviewing for excessiveness the award of punitive damages, the trial court was required to consider whether substantial evidence of "malice, oppression, or fraud" was presented to support the punitive damage award. In reviewing the punitive damage award for excessiveness, the trial court weighed the particular nature of the

defendant's acts in light of the whole record, the degree of reprehensibility of the defendant's conduct, the amount of compensatory damages and the relationship of those damages both to the amount of punitive damages to be awarded and to the wealth of the particular defendant. Such an independent review of the damage awards by a trial judge provided additional insulation to Boswell from any possibility that the punitive award was excessive as a result of the jury's passion and prejudice.

B. The Punitive Damage Award Bears A Reasonable Relation To The Compensatory Award And Is Not Disproportionate To The Severity Of The Offense.

Boswell's contention that the punitive damage award cannot stand because the eventual ratio of punitive to compensatory damages was not the ratio chosen by the jury is an argument of almost perfect circularity. Boswell complains that California's procedure for ruling on a motion for a new trial does not provide a meaningful and independent system of review, but when that procedure results in a reduction in Boswell's compensatory damages, as it did here, Boswell then complains that the punitive damage award fails because it does not bear the same relationship to the compensatory damages that was set by the jury. There is, however, nothing talismanic about the jury's original determination. If there were, post-trial review would be meaningless. The critical issue is whether the punitive damage award bears a reasonable relation to the compensatory damage award as reduced, a question already fully addressed and answered affirmatively by both the trial judge and the court of appeal.

Boswell also maintains that the award is "grossly out of proportion to the severity of the offense," is constitutionally excessive, and amounts to an attempt to "confiscate" a

portion of petitioner's net assets. (Pet. 27.) However, Boswell's myopic self-image as the hapless victim of mere poor judgment has been contradicted at each stage of these proceedings by everyone who has had the authority to pass on such questions.

Boswell intimates that a punitive award of $3.5 million for each respondent is particularly inappropriate here because Boswell's First Amendment interests are at stake. (Pet. 14 n. 4; 27-28.) Indeed, First Amendment rights *were* violated and chilled in this case — but they were *respondents'* First Amendment rights. This litigation began with Boswell's misuse of the courts through the filing of a meritless suit for the purpose of silencing, through intimidation, the respondents in the exercise of their First Amendment right to engage in the political process. California law imposes significant restrictions on the maintenance of a malicious prosecution action. In upholding respondents' claims against petitioner, California courts have determined both that Boswell initiated its suit without any reasonable basis whatsoever and also that it proceeded maliciously in prosecuting that suit. *See Sheldon Appel Co. v. Albert & Oliker*, 47 Cal.3d 863, 871-872, 254 Cal.Rptr. 336, 765 P.2d 498 (1989). No jurisdiction provides First Amendment protection for the conduct engaged in by Boswell.[21]

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[21] It is also ironic that Boswell relies upon the Report of the President's Council on Competitiveness, *supra*, (Pet. 11), which refers to the need to "promote certainty in commercial transactions by establishing boundaries for awards" and laments the high cost of product liability insurance. Of course, this case is not the type of commercial, personal injury, or products liability case to which the report was referring. Boswell commenced this litigation by seeking $1.5 million in punitive damages from each respondent. Boswell's newly found concern for "runaway jury verdicts," "unrestrained litigation," and the effects of punitive damage awards on the economy rings hollow in light of the reprehensibility of Boswell's conduct and the severe emotional distress inflicted on the respondents by petitioner.

C. No "Benchmark" Case Is Required to Explain *Haslip* And This Is An Inappropriate Case In Which To Consider The Constitutionality of California's System of Awarding Punitive Damages.

Boswell contends that this Court should grant certiorari review because a "benchmark" case is needed to clarify this Court's holding in *Haslip* in order to prevent the "confusion" and "pandemonium" rampant in the lower courts. (Pet. 8, 28.) Although Boswell suggests that the lower courts have applied *Haslip* in confusing, conflicting and contradictory ways and that further guidance by this Court is needed on the issue of punitive damages, the cases cited by Boswell reveal that the lower courts understand and are consistently applying the *Haslip* standard. None reject the teaching of other decisions, and so no conflicts have been created which would justify Supreme Court review. To the contrary, these decisions show that *Haslip* is being carefully and consistently enforced.[22]

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[22] The cases relied upon by petitioner provide no support for Boswell's contention that *Haslip* has been applied inconsistently in the lower courts. (Pet. 10-12; 28.) *Johnson v. Hugo's Skateway*, __F.2d__, 1991 WL 244278 (4th Cir. 1991) and *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95 (4th Cir. 1991) both involve decisions of the Fourth Circuit reviewing state court verdicts under the highly deferential federal standards of Federal Rules of Civil Procedure 50(b) and 59. *Mattison*, 947 F.2d at 99; *Johnson*, 1991 WL 244278, p. 11. The Fourth Circuit described that standard as "more deferential to jury verdicts than appears to be the process under the state law of Alabama," and therefore the guidance provided by *Haslip* was of "limited assistance." *Mattison*, 947 F.2d at 99.

In *Fleming Landfill, Inc. v. Garnes*, __S.E.2d__, 1991 WL 258826, p. 10 (W.Va. 1991), unlike the situation here, there was *no* award of compensatory damages on which to base the punitive damages award and the trial court had conducted only a superficial review under a standard permitting the setting aside of a jury verdict as excessive only when the award was "monstrous, enormous, beyond all measure, unreasonable, outrageous and manifestly show[s] jury passion, impartiality [*sic*], prejudice or corruption."

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The three requirements Boswell has suggested for punitive damage awards were in essence met in this case: (1) California's system of review provides for independent review of the jury's award by the new trial judge and the new trial judge here unquestionably engaged in such an independent review; (2) even though not required by California law, the new trial judge here stated in his written order why he upheld the punitive damage award; and (3) the court of appeal's opinion actually undertook a comparison of punitive damages awards in reviewing whether the award was reasonable or excessive.

(fn. continued)

In *Gamble v. Stevenson*, 406 S.E.2d 350 (S.C. 1991), the South Carolina Supreme Court prospectively adopted the post-trial review criteria mentioned in *Haslip*, but first found the existing South Carolina system of awarding punitive damages "sufficiently reasonable to withstand constitutional challenge" even though the court had not employed any of the reviewing criteria utilized by Alabama in reaching its decision.

In *American Employers Ins. Co. v. Southern Seeding Services Inc.*, 931 F.2d 1453 (11th Cir. 1991), the Eleventh Circuit, relying on *Haslip*, reversed and remanded an award of punitive damages because the district court had denied the motion for new trial and motion for judgment notwithstanding the verdict without comment. However, the Eleventh Circuit was applying the very same Alabama law which this Court reviewed in *Haslip* and was therefore obliged to follow the state requirement that the trial court specify its reasons in the record for refusing to interfere with the jury's verdict.

Robertson Oil Co., Inc. v. Phillips Petroleum Co., 930 F.2d 1342 (8th Cir. 1991), remanded an award totalling $8 million in punitive damages for the limited purpose of reconsidering the punitive damage award in light of *Haslip* because the defendant's motion for remittitur was "denied summarily" by the trial court and the appellate court was "thus unable to evaluate the adequacy of the district court's review of the award." *Robertson*, 930 F.2d at 1347. On remand, the district court affirmed the award of punitive damages under Arkansas' traditional "shock the conscience" test. *Robertson Oil Co., Inc. v. Phillips Petroleum Co.*, __F.Supp.__, 1991 WL 275408 (W.D. Ark. 1991) (Robertson III). None of these cases involved a system similar to California's and none show any "confusion" or "pandemonium" regarding how *Haslip* is to be applied.

Also, the instructions on punitive damages used in both phases of the trial in this case have been modified substantially by subsequent changes in California law. In another anomaly, the jury in this case was instructed at Boswell's request to apply a clear and convincing standard of proof in both phases of trial.

Finally, this appeal is from an unpublished decision of the state court of appeal which followed the prior decisions of the California Supreme Court upholding the constitutionality of punitive damage awards. (Pet. App. 51a.) Should this Court feel the need to review the constitutionality of California's system of punitive damage, such a review would best be undertaken from a definitive determination by California's highest court concerning this state's compliance with the *Haslip* standard.

Boswell seeks to have this Court abolish common law systems which have been in place for centuries and impose in their stead a rigid system of ratios and limits. Not only are such sweeping changes properly the responsibility of the state courts and state legislatures, *see Haslip*, 113 L.Ed. 2d at 33 (Scalia, J., concurring); *id.* at 35, (Kennedy) J., concurring), but such unsound alterations of the common law system would sacrifice the state's "interest in meaningful individualized assessment of appropriate deterrence and retribution," *Haslip*, 113 L.Ed.2d at 21, and seriously hinder the careful and reasoned exercise of judicial discretion by state court judges. As the district court in *Robertson III* wisely observed:

> Finally, it needs to be said that despite the moral skepticism of our age, its fascination with utilitarianism, and its tendency to apotheosize the work of the counting sciences, judging still requires judgment. Using judgment is not, as Holmes remarked in another context, a duty; it is merely a necessity. That there is some risk inherent in the enterprise does not distinguish it from any other

human undertaking and cannot excuse a refusal to engage in it. *Robertson*, __F.Supp.__, 1991 WL 275408 (W.D. Ark. 1991), p. 3.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court deny Boswell's Petition for A Writ of Certiorari.

Dated: January 31, 1992.

Respectfully submitted,

RALPH B. WEGIS,
Counsel of Record

DAVID J. COOPER
DAVID L. SAINE

KLEIN, WEGIS, DeNATALE,
HALL, GOLDNER & MUIR

Attorneys for Respondents
KEN WEGIS, JACK THOMSON,
and JEFF THOMSON